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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,
Petitioners,

v.

UNITED STATES OF AMERICA AND MBANK ABILENE, N.A.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MBANK ABILENE, N.A.

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STATEMENT OF THE CASE

A. State Court Proceedings.

In August 1986, Petitioners and three other individuals obtained a Texas state court judgment ("the Judgment") of approximately $69.4 million against Respondent MBank Abilene, N.A. ("MBank"). The Judgment was based on claims that MBank refused to fund an alleged oral commitment made by its prior management to lend $3 million to finance drilling operations of an oil and gas company owned by the state court plaintiffs. The former management of the bank, then called Abilene National Bank ("ANB"), first refused to loan money to the company after the bank came under investigation by federal regulatory authorities. The investigation ultimately led federal authorities to remove that management in mid-1982. Mercantile Texas Corporation, the predecessor of MCorp which now owns MBank, assumed ownership of ANB with the assistance of the Federal Deposit Insurance Corporation ("FDIC") and the Office of Comptroller of the Currency ("OCC"). In compliance with federal law, the new MBank management continued to refuse to loan money to Petitioners' company.

In 1984, MBank instituted foreclosure proceedings against Petitioners on personal debts that were in default. Petitioners then filed the state court action, initially seeking to restrain the foreclosure and later seeking damages. That suit ultimately led to the 1986 Judgment against MBank. Upon entry of the Judgment, MBank filed a motion to stay its enforcement pursuant to 12 U.S.C. § 91, which in pertinent part provides:

> [N]o attachment, injunction, or execution, shall be issued against such [national banking] association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court.

12 U.S.C. § 91 (1982) ("Section 91"). Because MBank maintained equity capital of only $17 million, it could not post the supersedeas bond required by Texas law to stay the execution of the Judgment. The state district court first entered an order granting a stay but withdrew that order on Petitioners' motion. MBank filed Motions for Leave to File Petitions for Writs of Mandamus with the Texas Fourteenth Court of Appeals and the Texas Supreme Court, both of which denied the motions without opinion and without reaching the merits.

On September 18, 1986, the state trial court entered an order denying MBank's Motion for New Trial.[1] On that same date, Petitioners began efforts to enforce the Judgment by securing writs of garnishment, naming as garnishees the Federal Reserve Bank of Dallas, MBank Dallas, N.A., MBank Fort Worth, N.A., and Anbore, Inc. The writs were served on the garnishees the next day. The service of these writs threatened MBank's continued operation. Checks presented for clearance through the payment system at the Federal Reserve Bank of Dallas were not honored, creating a severe imbalance in MBank's accounts and imminent insolvency. *See* September 19, 1986 affidavit of Robert J. Herrman, Senior Deputy

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1. Denial of the Motion for New Trial triggered the appellate process under Texas law. MBank's state court appeal on the merits is pending before the Texas Fourteenth Court of Appeals. MBank filed its brief on August 12, 1987. Petitioners obtained extensions of the normal 30-day period in which to reply, and their briefs were filed during the week of February 1, 1988.

Comptroller for Bank Supervision at the Office of the Comptroller of the Currency, ¶ 10.

B. Federal District Court Proceedings.

The following Monday morning, before the Bank opened for business, the United States filed suit in the United States District Court for the Northern District of Texas, Abilene Division, seeking to restrain Petitioners and other judgment plaintiffs from any judgment collection in violation of Section 91. The District Court granted the temporary restraining order, thus permitting the Bank to obtain needed liquidity from the Federal Reserve Bank and correspondent banks and to clear checks in the normal course of business. Thereafter, the District Court after appropriate hearings entered a preliminary injunction preventing enforcement of the Judgment.

The District Court in its opinion[2] held that "final judgment" as used in Section 91 means "a judgment from which no appeal can be taken." Petition Appendix C at 23a. In so ruling, the Court considered "Congressional intent," the "plain meaning of the words," and the "context" in which the words are used. *Id.* at 11. The Court also found that "[i]f a creditor were permitted to attach bank assets before final and dispositive resolution of his state court claim," he would not only be "effecting a preference" over other creditors in violation of Section 91, but he would also "cause havoc" if an appellate court overturned or modified the original state court judgment. *Id.* at 9. The Court noted that these effects were especially "problematic" when attachment rendered the bank insolvent before the appellate court could act. *Id.* at 9-10.

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2. *United States v. MBank Abilene, N.A.*, No. 86-143K, slip op. (N.D. Tex. 1986) (hereinafter cited as Petition Appendix C).

The District Court enjoined enforcement of the Judgment after finding that, absent an injunction, the United States would be irreparably injured. Petition Appendix C at 24a-26a. The Court also found that the "threatened injury" posed by enforcement of the judgment "outweighs any potential dangers suffered by" Petitioners. *Id.* at 27a. "By granting the preliminary injunction, the Court is serving the public interest; it is protecting the bank's depositors, creditors, as well as the public at large from the premature insolvency of one of its national banks." *Id.* at 28a.

C. Circuit Court Proceedings.

After granting Petitioners' request for an expedited appeal, the Fifth Circuit affirmed the grant of the preliminary injunction in September of 1987.[3] Recognizing that the term "final judgment" can be interpreted in different ways in different contexts, the Fifth Circuit correctly looked to the purpose of Section 91 for guidance. Petition Appendix B at 9a. The history of Section 91 in the case law led the Court to conclude that in order to effectuate the anti-preference purpose of the statute, final judgment must mean "a judgment on the merits which is no longer subject to examination on appeal, either because of disposition on appeal and conclusion of the appellate process, or because of the passage, without action, of the time for seeking appellate review." *Id.* at 12a. Final judgment must be interpreted in these terms in order to achieve the Congressional goal of "equality among the creditors of an insolvent bank." *Id.* at 10a, *citing, Pacific National Bank v. Mixter,* 124 U.S. 721, 726 (1888).

3. *United States v. LeMaire,* 826 F.2d 387 (5th Cir. 1987) (hereinafter cited as Petition Appendix B).

ARGUMENT

This case solely involves the interpretation of Section 91. Petitioners do not challenge the District Court's findings that an injunction was necessary to prevent irreparable injury, to balance properly the competing interests of the parties, and to serve the public interest. Although the interpretation of Section 91 is an important issue, the Fifth Circuit has correctly decided it. Neither this Court, nor any court of appeals, nor any district court, nor any state court in any reported decision has interpreted Section 91 inconsistently with the lower court decisions in this case. Accordingly, the Petition for Certiorari should be denied.

I. CONSIDERED IN CONTEXT THE TERM "FINAL JUDGMENT" AS USED IN SECTION 91 MUST MEAN A JUDGMENT FROM WHICH ALL APPEALS HAVE BEEN EXHAUSTED.

The central issue in this case involves the appropriate construction of the phrase "final judgment" as contained in Section 91. Petitioners contend that the term "final judgment" has the single, invariable meaning of a "trial court judgment which determines the rights of all the parties and disposes of all the issues involved in the suit." Petition at 23. In other words, they argue that "final" in all contexts must mean the same as "final" for purposes of appeal. The thrust of Petitioners' argument is that this single meaning mechanically determines the interpretation of Section 91.

The Fifth Circuit, however, correctly concluded that "[i]t is axiomatic that the meaning of final judgment varies according to context." Petition Appendix B at 7a. In

construing a portion of Section 91, this Court in *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 321 (1977), stated "[a]s always, 'the meaning of particular phrases must be determined in context'," *citing, SEC v. National Securities, Inc.*, 393 U.S. 453, 466 (1969); *Haggar Co. v. Helvering*, 308 U.S. 389, 396 (1940). Petitioners cite various authorities defining the term "final judgment" to mean a judgment entered by a trial court which is appealable because it disposes of all issues. The test of "finality" for determining appealability, however, does not determine the meaning of finality for purposes of Section 91. The common theme which controls the interpretation of the phrase "final judgment," both in statutes governing appellate jurisdiction and in Section 91, is that the phrase must be interpreted in context so as to effectuate the purpose of the particular statute.

A. The Anti-Preference Purpose of Section 91.

Section 91 is an integral part of a comprehensive scheme governing the operations of national banks. As Petitioners concede and this Court has consistently held, the heart of Section 91 is the prohibition of certain preferential transfers and payments by national banks. This Congressional purpose was first discussed by this Court in *Pacific National Bank v. Mixter*, 124 U.S. 721, 727 (1888), only fifteen years after the enactment of Section 91. *Mixter* has been recently reaffirmed in *Third National Bank v. Impac Limited, Inc.*, 432 U.S. 312, 320 (1977). The exemption from attachments and executions prior to final judgment contained in the final clause of Section 91 is necessary to prevent national banks from making preferential payments to creditors who resort to state court

collection procedures, until the claims of those creditors are finally determined to be valid.[4]

In support of its discussion of the anti-preference purpose of Section 91, the Court in *Third National Bank* quoted a portion of the Georgia Supreme Court's opinion in *Planters' Loan & Savings Bank v. Berry,* 91 Ga. 264, 18 S.E. 137 (1893), concerning the policy underlying Section 91, which is particularly applicable to the situation confronting MBank.

> The statutory policy seems to be to prevent all preference or priority in claims against these banks sought to be acquired by seizure of effects under State authority before the final adjudication of such claims, and to protect the banks from being weakened or crippled by such antecedent seizures. The national banks created by Congress are to control

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4. The Judgment is highly vulnerable on appeal. Petitioners' claims are based upon a breach of an alleged commitment by MBank to loan $3 million to a corporation in which Petitioners were shareholders. Petitioners claimed that the corporation was damaged by the failure to make the loan so that when they sold their stock they received less money than they would have received had the bank fulfilled its alleged loan commitment to the corporation. Over $40 million of actual damages in the Judgment is based upon a jury charge that permitted Petitioners to recover for "lost value of stock." As a matter of law, shareholders are not entitled to recover damages inflicted upon a corporation in which they own stock due to a breach of contract between that corporation and the defendant. *Massachusetts v. Davis,* 140 Tex. 398, 168 S.W.2d 216 (1942), *cert. denied,* 320 U.S. 210 (1943). Moreover, the alleged loan commitment was made by a former bank officer, Don Earney, when the Bank was under prior ownership and management. *See United States v. Kington,* 801 F.2d 733 (5th Cir., 1986). His authority to make the commitment was disputed, and extending the loan would have violated 12 U.S.C. § 84 (1982). Nevertheless, the state trial court did not submit any jury issues concerning Earney's authority to commit MBank (then called Abilene National Bank) to make the loan. These are only a few of the most egregious defects in the Judgment.

> their own assets and resources, as against State interference at the instance of creditors, or of pretended creditors, until the real existence of the alleged debts has been ascertained by final judgment.

Third National Bank, 432 U.S. at 321, n. 13. The Court in *Third National Bank* was careful to note that its construction of Section 91 was not violative of this Congressional intent, stating:

> It is true that Congress has consistently and effectively sought to minimize the risk of insolvency for national banks, and to protect bank creditors from disparate treatment. But those interests are fully vindicated by our construction of the Act.

Id. at 323. Execution on a judgment pending appeal would give a judgment creditor a preference inconsistent with the purpose of Section 91 since execution would allow a judgment creditor to obtain the judgment debtor's assets before other creditors, including depositors, merely because the judgment creditor has won the race to the courthouse. The preference to Petitioners in this case would be particularly aggravated because execution would put MBank at risk of insolvency.[5]

Unlike ordinary business corporations, MBank cannot resort to the bankruptcy courts to stay execution pending its appeal. National banks are not allowed to file bankruptcy. 11 U.S.C. § 109(b) (1982). Instead of vesting broad powers with the bankruptcy courts to protect debtors and to insure fair treatment of the competing claims of creditors, Congress has created a different regime to

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5. *See* Affidavit of Phillip Hoot, Chairman of MBank, filed under seal, regarding the effect on the bank of enforcement of the Judgment.

govern creditors' claims against national banks. As part of this regulatory plan, 12 U.S.C. § 191 provides that judgment creditors of a national bank are entitled to ask the OCC to place the bank in receivership thirty days after a state court judgment has gone unpaid within the meaning of that statute. The OCC "may," but is not required by that statute, to appoint a receiver as a result of any of the factors set forth in Section 191, including the failure of a bank to satisfy a judgment. Congress vested the discretion to make this determination with the OCC, not with the courts (state or federal) or with private litigants. The preliminary injunction in no way restrained Petitioners from making an application to the OCC under Section 191. Congress intended such a petition to be the exclusive remedy afforded to Petitioners pending resolution of MBank's appeal from the Judgment.

As another part of the regulatory regime governing national banks, Section 91 provides that those who claim to be creditors have significantly fewer rights to utilize the remedies of attachment, injunction and execution than do creditors of ordinary commercial enterprises. In return, the debtor bank is subjected to comprehensive regulation and supervision of its financial affairs. The OCC is the federal agency charged with supervising and regulating the national banking system to ensure its safety and soundness for the benefit of the depositors in national banks and the general public. 12 U.S.C. § 1, *et seq.*[6]

6. The anti-preference provisions of Section 91 are carefully structured so that a national bank is not hindered in the orderly conduct of its business. *See McDonald v. Chemical National Bank*, 174 U.S. 610 (1899) (payment of checks under clearing account arrangement); *Rucker v. Kokrda*, 68 F.2d 73 (10th Cir. 1933) (withdrawal by depositor); *Nelson v. Lewis*, 73 F.2d 521 (2d Cir. 1934) (withdrawal by depositor).

Thus, Sections 91 and 191 are integral parts of a consistent scheme of federal banking regulation preventing preferences to creditors and conferring on the OCC, not the courts, the responsibility for making the inherently subjective evaluations required to determine any national bank's financial condition. Therefore, until all appeals have been exhausted, state court judgment plaintiffs cannot execute on a judgment or take any other action to enforce a judgment; they can only apply to the OCC for a receivership after their judgment has gone unpaid for thirty days. The real thrust of Petitioners' argument in its Petition is directed at the wisdom of this regulatory plan established by Congress for national banks as it impacts those who claim to be creditors by virtue of a judgment. That argument is properly addressed to Congress, not this Court.

Petitioners devote an entire section of their Petition to a contention that other creditors of MBank are receiving preferences at their expense. Petition at 25-26. The factual matters referred to by Petitioners, however, amount to nothing more than ordinary business transactions on the part of MBank. Moreover, all these matters were put in evidence at the preliminary injunction hearing, and the District Court refused to find that other creditors were being preferred over Petitioners. To the contrary, in findings not challenged as clearly erroneous in this Court or the Fifth Circuit, the District Court found that Petitioners' "potential inability to collect their judgment" must give way to the "enormous resulting hardship" that would occur if their judgment collection efforts led to the dissolution of the bank. Petition Appendix C at 27a. The facts show that MBank is paying its obligations (including obligations owed to depositors

as creditors of MBank) when such obligations become due and payable. There is no suggestion that even one of the transactions violates any applicable statute or regulation. MBank is subject to continuous supervision by the OCC and the FDIC, and neither agency has suggested that any of the transactions are improper. The preliminary injunction requires MBank to report daily its financial condition to the District Court and Petitioners. If the information so provided should disclose any improper transactions, Petitioners have an opportunity to seek appropriate relief.

Unless and until the Judgment is affirmed following all appeals, there has been no final determination that the Petitioners are creditors of MBank. Section 91 prevents Petitioners from forcing MBank to prefer them over other creditors. Petitioners' attempts to enforce the Judgment are nothing more than their efforts to obtain preferential treatment. As such, MBank's payments to creditors in the ordinary course of business are not prohibited by Section 91 and do not constitute a preference in favor of other creditors of the Bank.

B. "Final Judgment" in Other Statutes.

As the Fifth Circuit noted, the use of the term "final judgment" in other contexts illustrates that the term need not always be used as the hallmark of an appealable judgment but may mean a judgment from which all appeals have been exhausted. Certain other statutory provisions which incorporate the term "final judgment" also refer to judgments from which all appeals have been exhausted rather than an appealable trial court judgment. The statute provid-

ing for costs and fees in cases in which the United States is a party provides that a party seeking an award of fees "shall, within thirty days of final judgment in the action, submit to the court an application for fees. . . ." 28 U.S.C. § 2412(d)(1)(B) (1982). That statute defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement." 28 U.S.C. § 2412(d)(2)(G) (1982). Likewise, 28 U.S.C. § 2414 deals with the procedure for the payment of "final judgments" rendered against the United States. The statute states:

> Whenever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and a judgment shall be deemed final.

28 U.S.C. § 2414 (1982). It is clear from the context of that statute that the phrase "final judgment" means one from which no further appeal can be taken and not one that is subject to appeal.

This Court has construed the phrase "final judgment" as used in a federal statute similar to Section 91 to mean "final" after all appeals have been exhausted. *Schell v. Cochran,* 107 U.S. 625, 628 (1883). The statute in question provides that "[e]xecution shall not issue against a collector or other revenue officer on a final judgment in any proceeding against him for any of his acts . . ." under certain circumstances set forth in the statute. 28 U.S.C. § 2006 (1982). The *Schell* Court stated:

> A writ of error in a case of this kind, being brought by direction of a department of the government,

> operates as a *supersedeas,* under sects. 1000 and 1001 of the Revised Statutes, without any bond to answer in damages being given. The plaintiff in the judgment being stayed as to execution while the case is in this court, and their being a new judgment rendered by this court in the suit, *"the final judgment" referred to in section 989 [28 U.S.C. § 2006 (1982)] is the judgment as it stands after its affirmance by this court,* and after the court below has rendered such judgment as the mandate of this court requires. (emphasis added).

Interestingly, the decision of the Court in *Schell v. Cochran* was rendered in 1883, only ten years after Congress enacted what is now codified as Section 91. What the Court understood the phrase "final judgment" to mean in this related context is a good indication of what Congress understood that phrase to mean only ten years earlier when it used that phrase in the statute for the protection of national banks.

C. The *Loew's* Decision.

While a number of reported opinions have examined Section 91, only one opinion prior to the decisions of the District Court and the Fifth Circuit in this case had addressed the issue before this Court.[7] A California state

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7. Petitioners erroneously cite *Massachusetts v. Mellon,* 262 U.S. 447, 487 (1923), for the proposition that the lack of any precedent supporting a particular construction of a statute is itself significant evidence that the newly asserted construction is incorrect. The *Mellon* court, in holding that a single taxpayer may not contest a Congressional act appropriating public funds, merely notes that it is significant that there was no precedent sustaining the right to maintain such an action although "a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect." *Id.* at 487. Thus, the *Mellon* court was not dealing with a newly asserted construction of a statute

court examined the precise issue in question in *Loew's, Inc. v. Superior Court*, 301 P.2d 64 (Cal. App. 1956). Construing Section 91, the court concluded that "final judgment" is one from which no appeal can be taken. *Id.* at 72. The court in *Loew's* reasoned that the Section 91 prohibition of writs of execution was intended to refer to the generally accepted meaning of "execution." The California court also recognized that a writ of execution commonly refers to a writ issued after the judgment of the trial court.

> Therefore, in order to make the section effective as to executions, the words "final judgment" must be held to refer to judgments from which no appeal can be taken and not merely judgments rendered.

301 P.2d at 72.

While Petitioners argue that "final judgment" as used in Section 91 must mean an appealable trial court judgment because that is the ordinary meaning of the phrase, they rely on an extraordinary meaning of the term "execution" to challenge the *Loew's* rationale. Petitioners cite authority for the proposition that executions were authorized prior to judgment in 1873, the time of enactment of Section 91. Petition at 19-20. The authority of that era makes it clear that an execution, in its *ordinary* sense, denotes a writ to enforce a judgment and not a prejudg-

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but with a novel assertion of standing by an individual taxpayer. Under the circumstances of this case, if any inference is to be drawn from the fact that only one case has considered the issue of the meaning of the term "final judgment" in Section 91, that inference should be either that only the Petitioners have sought to enforce a judgment against a national bank prior to exhaustion of appeals or that other national banks facing judgments have not needed to resort to the protection of Section 91.

ment remedy. A. Freeman, *Law of Executions* 3 (1885). The Freeman treatise states:

> There are a number of instances in the United States where, by statute, an execution may be issued without being preceded by a judgment. But the term "execution" will not in this work be used in its most comprehensive sense. It will be employed *in its most usual sense,* a sense in which it denotes a writ issued to enforce a judgment or order of a court of law, or a final decree of a court of equity.

Id. (emphasis added). Thus, the *Loew's* rationale complies with "a fundamental canon of statutory construction . . . that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States,* 444 U.S. 37, 42 (1979).

D. Language in Other Cases.

Petitioners quote language in previous opinions of this Court which they contend support the proposition that Section 91 applies only to "prejudgment writs." They cite passages from *Third National Bank v. Impac Limited, Inc.,* 432 U.S. 312 (1977), *Van Reed v. Peoples National Bank,* 198 U.S. 554 (1904), and *Earle v. Pennsylvania,* 178 U.S. 449 (1900). Petition at 12-15. None of these cases, however, involved the question of whether Section 91 prohibits execution on a judgment before its validity has been determined on appeal. This Court has never focused upon the meaning of "final judgment" in Section 91. The isolated passages quoted by Petitioners do not even rise to the level of considered dicta, must less represent definitive holdings of this Court.

For instance, *Third National Bank,* on which Petitioners place so much reliance, involved whether a state court could issue an order "restraining a national bank from holding a private foreclosure sale, pending adjudication of the mortgagor's claim that the note [was] not in default." 423 U.S. at 313. The literal language of Section 91 appeared to prohibit all injunctions "before final judgment," but the Court held that the proscription applied only to the "prejudgment seizure of bank property by creditors of the bank." 432 U.S. at 324. The focus of the opinion was whether the injunction disposed of bank assets so as to prefer one creditor over another, not whether the order at issue was a "final judgment." The Court was not required to construe the phrase "final judgment." Petitioners' adroit emphasis on selected words from passages they quote out of context cannot create precedent.

II. SECTION 91 PREEMPTS TEXAS SUPERSEDEAS BOND PROVISIONS.

The provisions of Section 91 are obviously paramount over state law regarding attachments and execution upon judgments. U.S. Const. art. VI; *Pacific National Bank v. Mixter,* 124 U.S. 721, 727 (1888). Thus, Texas state law requiring the posting of a supersedeas bond to stay the enforcement of a judgment pending appeal is subject to Section 91.

Contrary to Petitioners' repetitious allegations, sovereigns are not the only entities exempt from supersedeas bond requirements. A number of states have probate[8]

8. Colorado, Mississippi, Nevada, Ohio and Oklahoma exempt executors, administrators and other estate representatives from posting a supersedeas bond on appeal, if the representative has already given security to ensure his performance in that capacity. *See* Colo. R.

or poverty[9] exceptions. Many states,[10] including Texas as of January 1, 1988,[11] as well as the Federal Rules[12] vest wide discretion with trial courts in determining whether a bond is required to stay execution during the pendency of an appeal, in effect allowing their courts to carve out exceptions on a case-by-case basis. Ohio excepts trustees in bankruptcy from supersedeas bond requirements once they have given personal bond in such capacity. Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987). Nebraska and

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App. P. 8(c); Miss. Code Ann. § 11-51-99 (Vernon Supp. 1986); Nev. Rev. Stat. Ann. § 155.200 (Michie 1985); Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987); Okla. Stat. tit. 12, § 985 (1961).

Delaware, Missouri, Nebraska and Texas have similar exemptions, but do not expressly tie the availability of the exemption to the prior giving of security. *See* Del. Const. art. IV, § 24; Ind. Code Ann. § 29-1-1-22 (West Supp. 1987); Mo. R. Civ. P. 81.09; Mo. Rev. Stat. § 512.080 (Vernon Supp. 1987); Neb. Rev. Stat. § 24-541.02 (4)(a); Tex. Prob. Code Ann. § 29 (Vernon 1980).

South Carolina and Vermont exempt any appellant from posting bond to stay a decision by a probate court, regardless of the appellant's status. *See* S.C. Code Ann. § 62-1-308(a), (c) (Law. Co-op. 1987).

9. Georgia, Michigan, North Carolina, Oregon and Tennessee exempt indigents from their supersedeas bond requirements, generally upon the appellant's oath or affidavit that he cannot afford to post the bond. *See* Ga. Code Ann. §§ 5-3-22, 5-6-47 (1982); Mich. Ct. R. 3.604 (L); N.C. Gen. Stat. § 1-288 (1983); Or. Rev. Stat. § 19.045 (2) (1983); Tenn. Code Ann. § 27-5-103 (1980).

10. *See* Mass. R. App. P. 6(b)(1); Hawaii Fam. Ct. R. 8(b); Neb. Rev. Stat. § 24-541.03(6) (1985); N.C. Gen. Stat. § 1A-1, Rule 62 (1983); N.D. R. App. P. 8(b); N.D. R. Civ. P. 62(e); Ohio R. Civ. P. 62(D) (Anderson 1982); Or. Rev. Stat. § 19.045(2) (1983); Penn. R. App. P. 1737; Utah R. Civ. P. 62(a), (g); Utah R. App. P. 8(b); Wis. Stat. Ann. § 806.08(5) (West 1987); Wis. Stat. Ann. § 808.07(2)(a)(3), (b) (West 1987).

11. *See* Tex. R. App. P. Rule 47(b) (effective January 1, 1988).

12. Fed. R. Civ. P. 62; *see also Federal Prescription Service, Inc. v. American Pharmaceutical Assoc.*, 636 F.2d 755, 757-758 (D.C. Cir. 1980); *Trans World Airlines, Inc. v. Hughes*, 515 F.2d 173, 176 (2d Cir.), *cert. denied*, 424 U.S. 934 (1975).

Ohio permit receivers a stay of execution during the pendency of an appeal without additional security in the form of a supersedeas bond.[13] Several states waive supersedeas bond provisions when the appellant seeks review on another's behalf.[14] Finally, Maine and Vermont generally do not require a supersedeas bond at all in order to stay execution during the pendency of an appeal, effectively exempting all appellants.[15]

Texas state chartered banks are now exempt from filing supersedeas bonds. Following the Fifth Circuit's decision interpreting Section 91 in this case, and because of the threat posed by the recent rash of enormous lender liability awards against banks, the Texas Finance Commission adopted by regulation an exemption from posting supersedeas bonds for state banks in Texas. Tex. Finance Comm'n, 12 Tex. Reg. 4169 (1987), *adopted,* 13 Tex. Reg. 54 (1988) (codified at 7 TEX. ADMIN. CODE § 3.27). That regulation closely tracks Section 91, including a definition of "final judgment" in conformity with the decisions of the District Court and Fifth Circuit in this case.

Interestingly, North Dakota has a special exemption for appellant-farmers to protect them against potential insolvency caused by the appeal bond requirement. In North Dakota, any court may stay the issuance of execution upon a judgment "whenever in the judgment of the court the strictly legal procedure in any cause will confiscate or tend to confiscate the property of any litigant

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13. *See* Neb. Rev. Stat. § 24-334 (1985); Ohio Rev. Code Ann. § 2505.12 (Baldwin 1987).

14. Penn. R. App. P. 1736; Va. Code Ann. § 16.1-107 (1982); W. Va. Code § 58-5-14 (1966).

15. *See* Maine R. Civ. P. 62(e); Ver. R. Civ. P. 62(e).

by forcing the sale of agricultural products upon a ruinous market." N.D. Cent. Code § 28-29-04 (1974). Like the Section 91 exception created by Congress for national banks, North Dakota allows a stay of execution when the posting of the supersedeas bond would bankrupt the appellant-farmer. If the appellant must sell his agricultural goods in a poor market to meet the bond requirement, his appeal becomes futile. Even if he prevails on appeal and obtains the return of his bond, the forced sale will have bankrupt him. Section 91 provides national banks the same safeguard that North Dakota provides its farmers.

In any event, the provisions of Section 91 are sufficiently clear to operate as an exception to the Texas supersedeas bond requirement, particularly if the function and effect of a supersedeas bond is considered. The history of the writ of supersedeas and the giving of security to supersede the enforcement of a judgment is outlined in *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 382 (1883). The modern day supersedeas bond derives its name from "the effect of a writ of *supersedeas* in the English law from the superior to the inferior court." *Id.* at 397, (Miller, J., dissenting). Thus, at its inception, a supersedeas was literally a writ issued by a superior court to an inferior court, halting all executions on the inferior court judgment.[16]

16. The Freeman treatise, cited by Petitioners, states that "[a]t common law no undertaking nor other security was required," but that "[a]t the present time [1885] the rule is otherwise." A. Freeman, *Law of Executions*, 71 (1885). However, Freeman also discusses various states' rules which provided that the property of certain quasi-public corporations (toll road companies, ferries, etc.) was exempt from execution. *Id.* at 307-310. Against the background of this pre-1873 jurisprudence, it would not be startling for Congress to exempt the property of national banks from execution prior to exhaustion of appeals.

Section 91 operates as a statutory "supersedeas writ" in all cases involving judgments entered against a national bank. The statute, like the ancient English writ, is an order by a paramount authority, the Congress, prohibiting enforcements of judgments for a limited period of time, i.e., until all appeals have been exhausted and the judgment is "final."[17]

The exemption from state supersedeas requirements that Section 91 affords to national banks is not unique. Federal law also exempts other federally chartered entities by statutory provisions almost identical to Section 91.[18] The protection afforded national banks and other federally chartered institutions is part of a comprehensive scheme of federal regulation governing federally chartered financial institutions.

III. PETITIONERS' ATTEMPT TO RAISE AN ISSUE CONCERNING SUBJECT MATTER JURISDICTION IS FRIVOLOUS.

Petitioners contend, in an argument not advanced in the District Court or Fifth Circuit, that the federal court did not have subject matter jurisdiction to enjoin the

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17. Significantly, the Texas supersedeas bond provision expressly contemplates that statutory exceptions to the bonding requirement may exist. Tex. R. App. P. 47(a) provides in part: "Unless otherwise provided by law or these rules, an appellant may suspend the execution of the Judgment by filing a good and sufficient bond. . . ."

18. *See* 12 U.S.C. § 632 (1982) (protecting the Federal Reserve Banks); 12 U.S.C. § 1452(e) (1982) (protecting the Federal Home Mortgage Corporation); 12 U.S.C. § 1730(k)(1) (1982) (protecting the Federal Savings and Loan Insurance Corporation); 12 U.S.C. § 1789(a)(2) (1982) (protecting the National Credit Union Administration Board); 12 U.S.C. § 1819 (1982) (protecting the Federal Deposit Insurance Corporation); 45 U.S.C. § 822(e) (1982) (protecting the Railroad Rehabilitation and Improvement Fund).

enforcement of the judgment because such an action would make the federal court an appellate tribunal to the state court. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923). Both cases cited for this proposition are clearly inapposite. In *Rooker* and *Feldman,* the plaintiffs attempted to file cases in district court challenging judicial decisions that were, by statute, reviewable only by the Supreme Court. 28 U.S.C. § 1257 (1982) (previously codified at Judicial Code § 237, 39 Stat. 726 (1916)). Neither case involved an action filed by a party which was a stranger to the initial proceeding subject to Supreme Court review under 28 U.S.C. § 1257 (1982). Had MBank filed an action in federal court seeking an injunction, a *Rooker-Feldman* issue might have been presented. Here, the United States, which was not a party to the state court proceeding and could not attack the state court's action, invoked the subject matter jurisdiction of the federal court pursuant to 28 U.S.C. § 1345 (1982)[19] in order to vindicate its federal regulatory interests.

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19. The government also clearly had standing to invoke jurisdiction under 28 U.S.C. § 1345 and bring the action. This Court stated in *In re Debs,* 158 U.S. 564, 584 (1894):

> Every government, entrusted, by the very terms of its being, with powers and duties to be exercised and discharged for the general welfare, has a right to apply to its own courts for any proper assistance in the exercise of the one and the discharge of the other, and it is no sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all, and to prevent the wrongdoing of one resulting in injury to the general welfare, is often of itself sufficient to give it a standing in court.

These principles have been followed in *Federal Home Loan Bank Board v. Empie,* 778 F.2d 1447 (10th Cir. 1985); *United States v. Marchetti,* 466 F.2d 1309 (4th Cir. 1972), *cert. denied,* 409 U.S. 1063 (1972); *United States v. Arlington County,* 326 F.2d

The injunction granted by the District Court at the request of the government does not intrude upon or impede the ongoing appeal of the merits of the state court Judgment in any manner. The District Court scrupulously avoided involving itself in the merits of the state court action. The injunction facilitates the appeal by allowing MBank unfettered access to the state appellate process, access which would be effectively denied if premature enforcement of the Judgment forced the Bank into insolvency.[20]

CONCLUSION

Review of the Fifth Circuit's affirmance of the preliminary injunction should be denied. The Fifth Circuit correctly construed Section 91 to prohibit judgment collection efforts against MBank until all appeals have been exhausted. That construction gives proper effect to the anti-preference purpose of Section 91 as part of the comprehensive federal regulation of national banks. The United States met its burden for entry of a preliminary injunction. The trial court did not abuse its discretion in granting the injunction based on fact findings which are not clearly erroneous. The District Court clearly had jurisdiction to grant an injunction sought by the United States to vindicate its regulatory interest when the United States was not a party to the state court proceedings.

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929 (4th Cir. 1964); *United States v. City of Glen Cove,* 322 F. Supp. 149 (E.D.N.Y. 1971), *aff'd,* 450 F.2d 884 (2d Cir. 1971); *United States v. Brand Jewelers Inc.,* 318 F. Supp. 1293 (S.D.N.Y. 1970).

20. The injunction likewise does not violate the Anti-Injunction Act, 28 U.S.C. § 2283 (1982), since the United States sought the injunction. *N.L.R.B. v. Nash-Finch Co.,* 404 U.S. 138, 146 (1971); *Leiter Minerals, Inc. v. United States,* 352 U.S. 220, 226 (1957).

Therefore, the Fifth Circuit correctly affirmed the injunction.

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CERTIFICATE OF SERVICE

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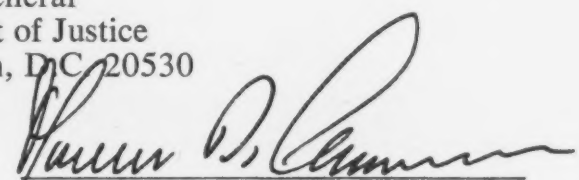

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